In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 872

EARLINE ALLEN, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California (Pet. App. ii) is not reported. The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. xii) is reported at 338 F. 2d 160.

JURISDICTION

The judgment of the court of appeals (Pet. App. xxi) was entered on November 5, 1964. The petition

for a writ of certiorari was filed on February 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below erred in applying the one year California statute of limitations in a suit in admiralty against the United States for wrongful death occurring on the navigable waters of that State.

STATUTES INVOLVED

The pertinent provisions of the California Code of Civil Procedure provide:

> Sec. 312. *General limitations; special cases*
>
> Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute.
>
> Sec. 335. *Periods of limitation*
>
> PERIODS OF LIMITATION PRESCRIBED. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:
>
> Sec. 340. *One year*
>
> Within one year:
>
> * * * *
>
> 3. * * * *wrongful death* * * * An action for . . . the death of one caused by the wrongful act or neglect of another, * * *.

The Public Vessels Act, 43 Stat. 1112, 46 U.S.C. 781, *et seq.*, provides in pertinent part:

46 U.S.C. 781:

> A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April, 1920.

46 U.S.C. 782:

> Such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the provisions of chapter 20 of this title [the Suits in Admiralty Act] or any amendment thereof, in so far as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon

a contract expressly stipulating for the payment of interest.

The Suits in Admiralty Act, 41 Stat. 525, as amended, 46 U.S.C. 741 *et seq.* provides in pertinent part:

46 U.S.C. 745:

> Suits as authorized by this chapter may be brought only within two years after the cause of action arises: * * *.

STATEMENT

Petitioner seeks to recover for the allegedly wrongful death of her husband, a Bethlehem Steel Corporation workman, who suffered a fatal injury when he fell from a scaffolding while painting a government vessel drydocked for repairs in Bethlehem's San Francisco shipyards. The accident occurred on navigable waters within the State of California and death benefits were duly accorded petitioner pursuant to the Longshoremen's and Harbor Workers' Act, 33 U.S.C. 901, *et seq.*

On January 9, 1963, more than one year—but less then two years—after her husband's death, petitioner filed the present libel in admiralty against the United States under the Public Vessels Act, *supra.* She alleged that her husband's death was attributable either to the government's negligence or to its failure to maintain its vessel in a seaworthy condition.

The district court dismissed the libel as untimely because it had not been filed within one year of her husband's death, in accordance with the California wrongful death provision. See Cal. Code of Civ. Proc.

§ 340(3), *supra*, p. 2. The court rejected petitioner's contention that, in suits against the United States, the State limitations rule should be disregarded in favor of the general two year provision for commencing admiralty actions against the government provided in the Suits in Admiralty Act (46 U.S.C. 745, *supra*, p. 4), incorporated in the Public Vessels Act by 46 U.S.C. 782, *supra*, p. 3. The court of appeals affirmed. 338 F. 2d 160 (Pet. App. xii).

ARGUMENT

The ruling below is directly supported by decisions of this Court and of other federal courts and there is no conflict on the issue presented. There is therefore no occasion for review by this Court.

It is well settled that the general maritime law affords a remedy for wrongful death occurring upon the navigable waters of a State only by adopting the local law, if any. *The Harrisburg*, 119 U.S. 199; *Western Fuel Co.* v. *Garcia*, 257 U.S. 233; *The Tungus* v. *Skovgaard*, 358 U.S. 588; *Hess* v. *United States*, 361 U.S. 314. In such circumstances, admiralty enforces the State-created right "as an integrated whole, with whatever conditions and limitations the creating State has attached." *The Tungus* v. *Skovgaard*, *supra*, 358 U.S. at 592. Specifically carried over is the State statute of limitations. *Western Fuel Co.* v. *Garcia*, 257 U.S. 233 (applying the statute of limitations involved in the instant case); *Continental Casualty Co.* v. *The Benny Skou*, 290 F. 2d 246 (C.A. 4). The rule

is the same when the suit is against the United States under the Public Vessels Act. *Mejia* v. *United States*, 152 F. 2d 686 (C.A. 5), certiorari denied, 328 U.S. 862; *California Casualty Indemnity Exch.* v. *United States*, 74 F. Supp. 401 (S.D. Cal.) (applying the statute of limitations involved in the instant case); *Rose* v. *United States*, 73 F. Supp. 759 (E.D. N.Y.). See, also *McMahon* v. *Pan American World Airways*, 297 F. 2d 268 (C.A. 5).[1] As the court below held, the only purpose of that enactment was to "impose on the United States the same liability . . . as is imposed by the admiralty law on the private shipowner . . ." Here, too, the remedy exists only by virtue of the State wrongful death statute and it must be taken as a whole.

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[1] *Wohlgemuth* v. *Meyer*, 139 C.A. 2d 326, 293 P. 2d 816, cited by petitioner (Pet. 7) is not to the contrary. While the California district court of appeals there characterized the statute of limitations as procedural, it did not hold that it could be disregarded. Rather, it held only that a cause of action for wrongful death arising from malpractice accrues when the malpractice is discovered, the same rule applied under California law for the accrual of a malpractice cause of action in non-fatal cases.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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